

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
NOVEMBER 28, 2007 Session

LESTER P. LAMBERTH v. CONNIE M. LAMBERTH (YOUNG)

**Direct Appeal from the Chancery Court for Sumner County
No. 92DII-124 Tom E. Gray, Chancellor**

No. M2007-00025-COA-R3-CV - Filed December 26, 2007

This appeal involves post-divorce criminal contempt proceedings. The father and the mother of two minor children were divorced in 1991. The father filed a criminal contempt petition on April 21, 2006, alleging that Mother violated a court order pertaining to his visitation. The chancery court held a hearing but did not issue a ruling; instead, the court took the matter under advisement. Thereafter, the father filed a “motion” requesting that the court hold mother in contempt for subsequent violations of the same court order pertaining to his visitation. This motion did not indicate that the father sought to hold the mother in criminal contempt. At this hearing, the mother represented herself and was found guilty of criminal contempt. The mother appeals and we reverse.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Reversed and
Vacated**

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Larry Hayes, Jr., Nashville, TN, for Appellant

M. Allen Ehmling, Gallatin, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

Lester P. Lamberth (“Appellee” or “Father”) and Connie M. Lamberth (“Appellant” or “Mother”) were divorced in 1991. The parties have two minor children. Upon Father’s petition for contempt, the trial court held a hearing on January 17, 2006, and found Mother in willful civil contempt of the court’s previous orders regarding Father’s visitation with the children. The court entered the order of contempt on March 3, 2006, admonishing Mother for failing to make the children available for Father’s visitation/residential sharing time. A parenting plan was also entered on March 3 providing Father with residential time of every other weekend from Friday at 6:00 p.m. to Sunday at 6:00 p.m. Father was to pick up the children at the Mt. Juliet Police Department, and at the conclusion of his visitation, Mother was to pick up the children at the Hendersonville Police Department. Mother remained the primary residential parent.

On April 21, 2006, Father filed a petition for criminal contempt, alleging that Mother violated the March 3, 2006 parenting plan concerning his visitation/residential time with the children. This petition listed in detail the dates and circumstances of Mother’s alleged contemptuous acts. Father requested that “the Court find the Defendant/Mother in willful criminal contempt of the Court’s Order for failure to allow the Plaintiff/Father’s visitation on the dates specified in the Petition, for failure to transport the children as set out in the Petition, and for failing to provide athletic schedule[s] . . . and that she be sentenced for up to ten (10) days per violation” The bottom of Father’s petition read, **“THIS IS A CITATION FOR CRIMINAL CONTEMPT.”** Subsequently, on April 25, 2006, Father filed notice that he was charging Mother with criminal contempt:

1. [Y]ou are hereby charged with CRIMINAL CONTEMPT pursuant to T.C.A. Section 29-9-101, et seq.,
2. [Y]ou have certain constitutional rights and said Plaintiff hereby gives notice of those rights:
 - a. You have the right to be represented by counsel and if you are unable to afford one, counsel shall be appointed for you;
 - b. You have the right to have guilt proven against you beyond a reasonable doubt with the burden of proof being on the Plaintiff;
 - c. You have the right against self-incrimination, which includes the right to remain silent as to the allegations of criminal contempt filed against you;
 - d. You have the right to a presumption of innocence ;
 - e. You have all the other rights afforded to any other individual charged with violation of a criminal statute.

Mother filed a hand-written answer denying all allegations set forth in Father's petition. The court held a hearing on October 31, 2006, did not issue a ruling at that time, but took the matter under advisement. Mother represented herself at this hearing.

On November 17, 2006, with the October 31 hearing still under advisement, Father filed a "**MOTION**," which is the subject of this appeal, requesting the following:

"an order holding the Defendant in contempt of Court for failing to appear for the visitation period for the Plaintiff set for the weekend of November 10-12, 2006 at 6 p.m. as required and the Defendant did not show with either of the children. [A]s a result, the Defendant is in open, willful and deliberate contempt of this Honorable Court and should be punished accordingly [I]ncluding but not limited to the awarding of attorney's fees and incarceration."

No constitutional notice was filed. This motion was heard on November 27, 2006. We do not have a transcript of this hearing; rather, the parties filed, and the court approved, a joint statement of the evidence on May 7, 2007, which provides, in part, as follows:

1. Mother had previously applied for court-appointed counsel on October 31, 2006 and the Court had determined that she did not meet the requirements for appointed counsel. Mother stated that she wished to proceed *pro se*. The Court reminded her that it deemed this matter a continuation of the earlier Petition and that she was facing criminal contempt, that her constitutional rights still applied as had been explained before and that she did not have to testify, but could testify if she desired, and that he would give her time to obtain counsel, if she desired

...

7. Before Mother testified, the Court reminded her again that this would be a Petition for Criminal Contempt and that she did not have to testify if she so desired. Mother testified that she had filed an Emergency Injunction Motion on July 6, 2006 and that she was under the impression that the Court was still considering the merits of her Motion¹ On cross examination, Mother admitted that she did not show up for [Father's] visitation on November 10, 2006.

¹ On July 6, 2006, Mother filed *pro se* an "emergency injunction motion" requesting that Father's overnight visitation be suspended, and that his other visitation be supervised. Mother alleged, among other things, that the parties' daughter was raped while in Father's home.

8. [Chancellor Gray] asked her [to] put on proof in the underlying case regarding her Emergency Injunction Motion and that she had failed to do so, and as a result, that Motion was dismissed. . . . The Court explained again, . . . that Mother could ask for a modification of the residential sharing time upon the filing of an appropriate Petition.
9. The Court found the proof to be beyond a reasonable doubt [a]nd [t]he Court ruled from the bench that Mother was in willful criminal contempt and that she would be sentenced to 10 days in jail, with 8 days suspended

On December 1, 2006, Mother's new counsel filed a motion pursuant to Rule 62 of the Tennessee Rules of Civil Procedure for the entry of a final order reflective of the October 31, 2006 criminal contempt hearing. The court thereafter on December 4, 2006, entered an order which found that on October 31, Mother was not indigent and therefore, not entitled to a court-appointed attorney. The order indicates that Mother did not want a continuance and elected to proceed *pro se*. The order states that "[t]his matter is brought pursuant to Tennessee Code Annotated Title 29 Chapter 9 Part 1 asking the Court to find [Mother] in criminal contempt and incarcerate her." The court did not find Mother in criminal contempt, but did order that Mother "is restrained that is, prohibited from stating to [Father] or to the parties' children or in the presence of the children that [Father] is not the father."

On December 5, 2006, the court entered an order reflecting the November 27, 2006 hearing (on Father's November 17, 2006 "motion"). The order states, in relevant part, as follows:

Contempt, the Defendant having been notified of her rights, including the right not to incriminate herself and her right to have counsel, the Court already having found the Defendant not to be indigent, . . . the Court finds as follows:

1. That the Court finds [Mother], to be in open, willful and deliberate criminal contempt of this Honorable Court by Proof beyond A reasonable doubt;²
2. That the Defendant, [Mother], is sentenced to ten (10) days in the Sumner County Jail to serve forty-five (45) hours of said sentence with the remainder of said ten (10) day sentence to be suspended

The trial court thereafter issued a stay on Mother's sentence pending appeal.

II. ISSUES PRESENTED

Appellant has timely filed her notice of appeal and presents the following issues for review:

² The order is typed and originally read "clear and convincing evidence," but this is marked out, and hand written above is "Proof beyond A reasonable doubt."

1. Whether the trial court lacked subject matter jurisdiction over this criminal contempt matter because Father failed to verify the contempt petition.
2. Whether Mother's substantive and/or procedural due process rights were violated in this criminal contempt matter because:
 - a. the motion was neither verified nor accompanied by affidavit;
 - b. the motion did not describe the matter as criminal contempt;
 - c. the notice did not allow Mother a reasonable time to prepare a defense.

We reverse the decision of the chancery court and remand for further proceedings.

III. STANDARD OF REVIEW

On appeal, a trial court's factual findings are presumed to be correct, and we will not overturn those factual findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d) (2007); **Bogan v. Bogan**, 60 S.W.3d 721, 727 (Tenn. 2001). We review a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness. **Union Carbide Corp. v. Huddleston**, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. DISCUSSION

A. Subject Matter Jurisdiction

Mother first contends that the chancery court lacked subject matter jurisdiction because Father's November 17, 2006 "motion" was not verified. Mother rests her argument on **Glanton v. Glanton**, No. 01-A-01-9601-PB00013, 1996 WL 502136, at *1 (Tenn. Ct. App. Sept. 6, 1996), but the **Glanton** decision relied on a provision in the Tennessee Code which is no longer law.³ Tenn. Code Ann. § 29-9-102 extends courts broad authority to inflict punishment for contemptuous behavior. This argument has no merit, as the chancery court had proper subject matter jurisdiction over this matter.

³ In **Glanton**, the mother filed an unverified contempt petition in the Probate Court for Davidson County seeking to recover unpaid child support from the father. 1996 WL 502136, at *1. On appeal, the court relied on the following statute in affirming the chancery court's decision to dismiss the contempt petition: "A petition shall be filed [in chancery court] stating the contempt complained of supported by affidavit, together with such exhibits and returns of officers, or certified copies thereof, as may fully show how the contempt arose." Tenn. Code. Ann. 21-1-108. This provision has since been repealed by 2002 Public Acts, chapter 493, section 1 as of July 1, 2002. Thus, Mother's argument has no merit.

B. Notice

Next, Mother argues that her substantive and/or procedural due process rights were violated. We need not address each sub-issue raised by Mother, as we find that the notice requirement of Rule 42(b) of the Rules of Criminal Procedure was not met. Consequently, we vacate the chancery court's December 5, 2006 order finding Mother in criminal contempt and vacate the sentence.

Criminal contempt is "punitive in character, and the proceeding is to vindicate the authority of the law, and the court as an organ of society." *State of Tennessee v. Turner*, 914 S.W.2d 951, 955 (Tenn. Crim. App. 1995). Criminal contempt is classified as either direct or indirect: direct contempt is an act committed in the court's presence, whereas indirect contempt is an act committed outside the court's presence. *Id.* (citations omitted); *Dargi v. Terminix Intern. Co., L.P.*, 23 S.W.3d 342, 345 (Tenn. Ct. App. 2000). Trial courts have authority to summarily punish an individual for direct criminal contempt, but for cases involving indirect criminal contempt, Rule 42(b) of the Tennessee Rules of Criminal Procedure provides as follows:

(b) Disposition on Notice and Hearing. A criminal contempt shall be prosecuted on notice, except as provided in subdivision (a) of this rule.

(1) Content of Notice. The criminal contempt notice shall:

(A) state the time and place of the hearing;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the criminal contempt charged and describe it as such.

(2) Form of Notice. The judge shall give the notice orally in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by a show cause or arrest order.

...

"Tenn. R. Crim. P. 42(b) requires that parties facing a criminal contempt charge be given explicit notice that they are charged with criminal contempt and must also be informed of the facts giving rise to the charge." *Long v. McAllister-Long*, 221 S.W.3d 1, 13 (Tenn. Ct. App. 2006) (citation omitted). Furthermore, an individual charged with criminal contempt is entitled to the constitutional protections afforded to other criminal defendants, including the presumption of innocence and notice. *Storey v. Storey*, 835 S.W.2d 593, 599 (Tenn. Ct. App. 1992).

In the present, case, there was nothing to indicate to Mother that the November 17, 2006 "motion" was in fact a petition for criminal contempt. Near the bottom of the motion, Father requests for Mother's incarceration, but such a request is consistent with both criminal and civil contempt. See *Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000); *Long v. McAllister-Long*, 221 S.W.3d 1, 13 (Tenn. Ct. App. 2006); *Thomasson v. Thomasson*, No. 01A-01-9706-CV-00273, 1998 WL 382190, at *6 (Tenn. Ct. App. Jul. 10, 1998). Nor do we agree with Father's contention that the

November 27 hearing was simply a continuation of the previous October 31 contempt proceeding. The alleged contemptuous acts occurred after the October 31 hearing and are separate and distinct acts than those previously alleged in the procedurally correct petition. Just because notice was given in the past to Mother does not mean that notice is no longer required for future alleged contemptuous acts. Father makes much of the fact that Mother had oral notice at the beginning of the hearing, but we do not believe that is sufficient in this case, as Mother was representing herself. While it is also true that Mother could have asked for a continuance, a continuance would have served no purpose, as the court already ruled that Mother was not indigent, and thus not entitled to appointed counsel.

V. CONCLUSION

Based on the aforementioned reasons, we reverse the decision of the chancery court and vacate the December 5, 2006 order finding Mother in criminal contempt and sentencing her. Costs of this appeal are taxed to Appellee, Lester P. Lamberth, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.